Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–173–92
JEMURI SERJAN CJ (BORNEO), PEH SWEE CHIN AND WAN YAHYA SCJJ
17 JUNE 1993

Agency *— Liability of agent — Local agent contracting on behalf of foreign principal — Whether agent was personally liable — Statutory presumption under s 183(a) of the Contracts Act 1950 — Whether agent could get rid of personal liability — Contracts Act 1950 s 183(a)*

Contract *— Agency — Liability of agent — Local agent contracting on behalf of foreign principal — Whether agent was personally liable — Statutory presumption under s 183(a) of the Contracts Act 1950 — Whether agent could get rid of personal liability — Contracts Act 1950 s 183(a)*

The plaintiff and the defendant are locally incorporated companies. The plaintiff purchased certain machines from the defendant for the purpose of making plastic bottles and when the machines arrived from abroad, viz Switzerland, the plaintiff complained that they were not fit for the purpose for which they were bought and were further defective or were not of merchantable quality. The plaintiff sued the defendant. By its defence, the defendant contended that there was no contract between the plaintiff and themselves and that the existence of a contract, if any, was between the plaintiff and the defendant's principal, UHAG Kebersee-Handel Ag Zurich ('UHAG'). The trial judge held that there was no contract in law between the plaintiff and the defendant and that the defendant had merely arranged a contract which was entered into between the plaintiff and UHAG. The defendant was therefore an agent and there was no contract between the defendant and the plaintiff. The plaintiff has appealed.

Held, allowing the appeal:

(1) Section 183(a) of the Contracts Act 1950 mean unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract in regard to sale and purchase of goods from the principal who is resident abroad. This presumption of personal liability arises when the above elements are proved.

(2) The only way for an agent of a foreign principal to get rid of the personal liability of such an agent would be, either by express words or impliedly, by a necessary inference or implication from documents, evidence and surrounding circumstances, showing that the agent had in fact contracted out of such statutory presumption or such personal liability. There was no such evidence in the instant case. Therefore, s 183(a) applied to the defendant

A and the defendant was bound by or could be sued personally on the contract of sale and purchase of the said machines, subject of course to proof of liability in regard to breach of contract and damages.

B **[Bahasa Malaysia summary**

Plaintif dan defendan adalah syarikat tempatan yang telah diperbadankan. Plaintif telah membeli mesin-mesin tertentu daripada defendan untuk tujuan membuat botol plastik dan apabila mesin itu tiba dari luar negara, iaitu Switzerland, plaintif telah mengadu bahawa mesin-mesin itu tidak sesuai untuk tujuan ianya dibeli dan lebih-lebih lagi, mesin itu rosak atau tidak mempunyai kualiti boleh dagang. Plaintif telah mendakwa defendan. Melalui pembelaan mereka, defendan berhujah bahawa kontrak tidak wujud di antara plaintif dan mereka dan kewujudan kontrak, jika ada, adalah di antara plaintif dan prinsipal defendan, UHAG Kebersee-Handel Ag Zurich ('UHAG'). Hakim perbicaraan memutuskan bahawa tidak terdapat kontrak yang wujud dari segi undang-undang di antara plaintif dan defendan dan bahawa defendan hanya telah menguruskan suatu kontrak yang telah diikat di antara plaintif dan UHAG. Oleh itu, defendan merupakan seorang agen dan tidak terdapat kontrak di antara defendan dan plaintif. Plaintif telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Seksyen 183(a) Akta Kontrak 1950 dengan tepat dan jelas menyatakan bahawa liabiliti diri akan terkena kepada seseorang agen melalui anggapan statutori apabila beliau merupakan seorang agen yang bertindak bagi pihak prinsipal berkaitan dengan kontrak jualbeli barang-barang dari prinsipal yang merupakan pemastautin luar negara. Anggapan liabiliti diri ini bangkit apabila unsur-unsur di atas dibuktikan.

(2) Satu-satunya cara untuk seseorang agen prinsipal asing melucutkan liabiliti diri adalah dengan, melalui kata-kata yang nyata atau tersirat, melalui inferens atau implikasi yang perlu dari dokumen-dokumen, keterangan dan keadaan sekitar, menunjukkan bahawa agen itu pada hakikatnya tidak menyertai anggapan statutori atau liabiliti diri yang sedemikian. Tidak terdapat keterangan sedemikian di dalam kes ini. Oleh itu, s 183(a) terpakai kepada defendan dan defendan diikat oleh atau boleh didakwa secara peribadi atas kontrak jualbeli mesin-mesin itu, tertakluk kepada bukti liabiliti berkaitan dengan kemungkiran kontrak dan ganti rugi.]

Notes

For cases on the liability of an agent, see 1 *Mallal's Digest* (4th Ed) paras 462–488.

For cases on agency in a contract, see 3 *Mallal's Digest* (4th Ed) paras 787–796.

Cases referred to

1 *Amstrong v Stokes* (1872) 7 QB 506 (refd)
2 *Gnanasundera v Berton Export Co of New York* AIR (1964) 13 (folld)

Legislation referred to

Contracts Act 1950 s 183(a)

Appeal from: Civil Suit No 241 of 1979 (High Court, Kuala Lumpur)

A Kanesalingam (*Kanesalingam & Co*) for the appellant.
Chin Yew Meng (*Allen & Gledhill*) for the respondent.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): The appeal raises the question of the limits or scope of the statutory presumption under s 183(a) of our Contracts Act 1950 (hereinafter 'the Act') which for convenience is set out below:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract, shall be presumed to exist in the following cases:
>
> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> ...

Both parties are locally incorporated companies. The plaintiff has allegedly purchased certain machines from the defendant for the purpose of making plastic bottles. When the machines arrived from abroad, viz Switzerland, the plaintiff complained that they were not fit for the purpose for which they were bought and were further defective or were not of merchantable quality. The plaintiff sued the defendant.

By its statement of claim as amended, the plaintiff has contended that it bought the machines from the defendant by 'a contract evidenced in writing dated 8 July 1977 ...' and to cut the matter short, the plaintiff has claimed damages, etc. By its defence, as amended, the defendant, while admitting to having sent the said letter, has contended that there was no contract between the plaintiff and the defendant and 'that the existence of a contract, if any, is between the plaintiff and the defendant's principal, namely, UHAG Kebersee-Handel Ag Zurich (hereinafter 'UHAG').

It has never been disputed that the machines in question were received and paid for by the plaintiff and in the purchase of which, the defendant alleged it merely acted as commission agent for UHAG. Neither has it been disputed that the payment was made directly to UHAG and the defendant 'commissioned' or assembled the machines for the plaintiff who negotiated with the defendant about technical details of the machines. The cut and

thrust of the defendant's evidence and submission has been about the defendant being merely an agent for UHAG and about the plaintiff having made a sale and purchase contract with UHAG and not with the defendant, amounting to there being no contract as such between the defendant and the plaintiff.

From the grounds of judgment, his Lordship appears to have held that there was 'no contract in law' between the plaintiff and the defendant, and at p 18 of the appeal record, said: 'This is to my mind not a case when the defendant had entered into a contract with the plaintiff on behalf of their principal but rather of a case when the defendant merely arranged a contract which was entered into between the plaintiff and UHAG. Defendant was therefore an agent and there was no contract between the defendant and the plaintiff'.

After analysing a great deal of documentary and oral evidence, the lower court came to the finding that the defendant was the agent of UHAG. This would merely reinforce the plea in the defence (as amended) that the defendant was an agent for UHAG, but his Lordship dismissed the claim for damages of the plaintiff without considering further all other issues raised before him.

It has further never been disputed that UHAG's name and identity have been known to the plaintiff from the outset and this the defendant has been at pains to stress. That UHAG has been the seller of goods and resident abroad (Switzerland) has never been in doubt. There was also no formal written contract between UHAG and the plaintiff. The findings and facts of this case in our opinion, then fit squarely into the statutory presumption under s 183(a) of the Act which would apply to the instant case.

Section 183 states the well-known ordinary rule of no personal liability for an agent, but this rule is subject to quite a few exceptions one of which is s 183(a). If one reads and re-reads this proviso (a), it will still mean unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract in regard to sale and purchase of goods from the principal who is resident abroad. This presumption of personal liability arises when the above elements are proved.

It is to be borne in mind that the proviso must have been derived from the state of the common law at the time when the Indian Contract Act 1872 was enacted in or about 1872. At common law, the origin of the point in question appears to be an English mercantile usage to the effect that in a sale or purchase of goods credit is considered to be given by local businessmen to a local agent of a merchant resident abroad and not to the latter because, inter alia, it is said the merchant abroad in such a sale or purchase of goods does not give the local agent any authority to pledge his credit to those with whom the local agent deals, see *Amstrong v Stokes*;[1] for it is easily understandable that a local businessman will not normally give credit to the foreign principal of the local agent, but only to the latter for, generally, for example, the creditworthiness or quality of goods of the merchant resident abroad is often fraught with uncertainties and such similar uncertainties must have been more daunting in olden days.

In general, a foreign principal who makes a contract through a local agent can sue and be sued in our local courts, (for example, O 11 r 1(f)(ii) of the Rules of the High Court 1980, in fact provides expressly for the procedure for such a foreign principal to be served out of jurisdiction), though such proceedings involving such a foreign principal could give rise to some concomitant inconveniences such as being liable to be required to provide for security for costs when suing and being required to apply for leave for service out of jurisdiction, etc when sued. Such a local agent, exceptionally, can be sued personally in certain well-known but limited cases and one of which is this proviso (a). For example, such a local agent was sued together with his foreign principal in a same action in *Gnanasundera v Berton Export Co of New York*.[2]

It is to be borne in mind that the proviso was enacted in the Indian Contract Act 1872, and it was based on the state of common law touching on the same point as in 1872. It is entirely possible that the common law giving rise to the proviso has, since 1872, been modified or further developed by cases in England and English cases on the same point decided prior to 1872 would be arguably more relevant.

With the proviso, the local people would be better protected in their dealings with the foreign merchants for they can pin their hope on the local agents for their price or goods. This mercantile usage (which has been criticized by some writers) is of universal value, not being valuable only to the native English.

Dealing now more directly with the scope of the proviso (a), the findings of the learned judge and the admission by pleading would certainly attract the operation of the proviso (a). To dismiss the claim of the plaintiff herein in the light of such evidence, finding and admission by pleading, would be obviously to regard the proviso (a) as a dead letter, in our opinion, with respect to the learned trial judge. We must hasten to add that the commentary under this proviso (a) in some well-known text book could have very well given rise to some confusion caused in turn by some confusion in the decided cases up to the date of the edition of that book.

It does not seem to be sufficiently realized that the statutory presumption from this proviso (a) is a presumption that *personal liability* of an all-apparent agent in respect of such a contract as the one involved herein shall be presumed to exist notwithstanding that the agent is an agent (emphasis added). It is certainly not a presumption to the effect that a contract of a foreign principal should be presumed to be the personal contract of his local agent, unless the local agent proves that it is not his contract but his principal's contract.

For merely to prove that it was in fact the contract of the foreign principal and the agent has merely acted as agent is definitely not enough for the purpose of this proviso (a) for such proof would just merely trigger the operation of the statutory presumption.

The only way for an agent of a foreign principal, in our opinion, to get rid of the personal liability of such an agent would be, either by express words or impliedly by a necessary inference or implication from documents, evidence and surrounding circumstances showing that the agent has in fact,

A contracted out of such statutory presumption or such personal liability. We have found no such evidence in the instant case.

Thus the case of *Gnanasundera*,[2] is a classic case in point. In that case (apparently on the level of a court of appeal from an assistant judge of the Madras civil court), the Madras plaintiff there purchased goods from the first defendant, a firm of New York, USA through the second defendants, B agents in Madras for the said American firm.

The plaintiff, having paid for the goods by letter of credit, found the goods when they arrived, to be not up to description, and sued both the American firm as first defendant and the Madras agents as second defendants. The contract signed, by its cl 26 significantly provided an exemption of C liability granted by the plaintiff there in favour of the Madras agents as follows:

> If the goods are delivered for any reason mentioned in para 22 or the goods happen to be other than the one ordered for or inferior in quality, for all the above deviations singly or all put together I/we will not hold you responsible to D pay me/us any damages or compensation but I/we will have all our action against your principals and none against you as the agents of your principals.

It was argued for the Madras agents that they were merely brokers for the American firm, and that the contract was directly between the plaintiff and the American firm so that the section in the Indian Contract Act 1872, (in pari materia with s 183(a) of our Act) had no application. This argument E was rejected unanimously. It was apparently further argued that the Madras agents ought to be exonerated by cl 26 quoted above. It was held to the effect that cl 26 there did exempt the Madras agents from liability to the plaintiff in regard to damages for inferior goods, or goods other than those ordered but the court there found there was no clause in that contract to F exempt the Madras agents from the liability to refund the money paid already, to the American firm, against which goods as ordered had not been delivered and the Madras agents (the second defendants) were therefore ordered to refund such money. Jagadison J in delivering a concurring but separate judgment said at p 114:

G (9) What then is the correct position on the facts of this case? We do not have the slightest doubt that the second defendant acted as the agent of the first defendant. The terms of the contract and the surrounding circumstances establish this quite clearly. The name of the principal is also disclosed. The second defendant cannot, therefore, be made personally liable under the contract. But being an agent of a foreign principal who sold the goods to the H plaintiff he falls squarely within the exception under s 230. In order to avoid personal liability, the second defendant must show that by express words or by necessary implication he contracted out of such liability. In regard to the liability of damages cl 26 referred to by my learned brother in his judgment quite clearly exempts him from liability of any kind. But in regard to the refund of the advance amount, there is no specific provision in the contract I excluding the liability.

We entirely agree with the reasoning in that case.

We feel we ought to allow the appeal by holding that s 183(a) applies to the defendant and that the defendant is bound by or can be sued personally

on the contract of sale and purchase of the said machines which has existed, subject of course to proof of liability in regard to breach of contract and damages. It remains for his Lordship in the court below to continue to deal with and determine by a subsequent or final judgment all other issues raised, (including the issues of liability for defective goods, etc and of damages, if any, and the amount of such damages, etc), the determination of which was deemed earlier to have been unnecessary because of the decision which is being hereby reversed. We do not propose to order a retrial before another judge because of the excessive delay, inconvenience and expenses that will be caused.

We therefore allow the appeal with costs here and below. We further remit Kuala Lumpur High Court Civil Suit No 241–1979 to the lower court for continuation by the same judge and subsequent decision on the whole case, with further costs incurred hereafter to abide by any further order of the lower court. Deposit in this court is to be paid out to the appellants on account of taxed costs.

Order accordingly.

Reported by Prof Ahmad Ibrahim